No. 1047

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

BITTER ROOT DEVELOPMENT COMPANY (a corporation), ANACONDA MINING COMPANY (a corporation), ANACONDA COPPER COMPANY (a corporation), ANACONDA COPPER MINING COMPANY, (a corporation), MARGARET P. DALY, MARGARET P. DALY, as executrix of the estate of Marcus Daly, deceased, JOHN R. TOOLE, WILLIAM W. DIXON, WILLIAM SCALLON and DANIEL J. HENNESSY,

Appellees.

} In Equity

ADDITIONAL BRIEF AND ARGUMENT FOR APPELLEES.

W. W. DIXON, A. J. CAMPBELL, A. J. SHORES, C. F. KELLEY, JOHN F. FORBIS and L. O. EVANS, of Butte, Montana, Solicitors and of Counsel for Appellees.

THE FILMER BROS. CO. PRINT, 424 SANSOME ST., S. F.

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Appellees.

Additional Brief and Argument for Appellees.

In Appellant's Brief filed in this cause there are specified and discussed a number of grounds upon which it is contended equitable jurisdiction was conferred by the bill of complaint upon the lower court. Upon the oral argument before this Court there was

argued and authority cited in support of an additional ground for asking a reversal of the action of the lower court—that is, that the action is maintainable in equity for the purpose of declaring a trust in property possessed by the defendants. This proposition while seriously urged by counsel for appellant in the argument was evidently considered of such slight improtance that it was entirely overlooked in the presentation in Appellant's Brief of the theories upon which the bill was framed and presented in equity. But we submit that the contention of counsel for appellant in this connection affords no ground whatever for equitable interposition in this cause.

In the first place, under the general rule, the application of the principle that equity will follow and declare a trust in property for the benefit of the real owner, where money or other property has been misapplied, is confined to cases where the misapplication or misappropriation has been done by parties standing in some fiduciary relation to the wronged party.

Perry on Trusts, 5th ed., vol. 1, sec. 128, page 170, and cases cited.

Hawthorn vs. Brown, 3 Sneed (Tenn.), 462.

Counsel for appellant has cited two cases:

Newton vs. Porter, 69 New York, 163.

The American Sugar Refining Co. vs. Fancher, 145 New York, 552.

to the effect that the same principle will be applied where the trust arose through a tort. Even a cursory examination of these cases will disclose the fact that

each is based upon the peculiar facts appearing therein, and they only affirm and strengthen our contention that the bill of complaint in the case at bar states no facts justifying equitable interference on the ground that complainant is entitled to follow the proceeds claimed to have been received from the conversion and sale of its timber.

In the case of Newton vs. Porter, 69 N. Y. 133, certain bonds had been stolen from plaintiff by parties who had sold them, and the proceeds had been invested in other securities. The parties who had stolen the bonds were absolutely insolvent. The plaintiff was without remedy except to follow the proceeds of the bonds into the purchased securities. The proceeds from the sale of the bonds were clearly identified and followed into the securities claimed. There was clearly no remedy at law, and the only redress which could be afforded plaintiff was to declare her to be rightfully entitled to the securities purchased with the proceeds of her property.

In the case of American Sugar Refining Company vs. Fancher, 145 N. Y. 522, the proceeds of the sale of personal property induced by fraud was followed by the vendor and identified specifically and beyond question in the hands of a voluntary assignee of the vendee. The vendee, the party committing the fraud, was hopelessly insolvent. There was no remedy at law or other redress that could be afforded the plaintiff than to permit him to follow his property into the hands of the assignee.

In each of the foregoing cases, as in all cases in equity, jurisdiction was maintained by the Court, solely upon the ground that there was no remedy at law, in each case the parties committing the wrong being hopelessly insolvent.

In the case of the American Sugar Refining Company vs. Fancher, supra, the Court emphasizes the fact that it would not proceed in equity, in the absence of a showing that no legal remedy was available and adequate, in the following language:

"When these legal remedies are available and adequate, clearly there is no ground for going to a court of equity. The legal remedies in such case are and ought to be held exclusive. But in a case like the present, *where there is no adequate legal remedy,* either on the contract of sale or for the recovery of the property in specie, or by *an action of tort,* is the power of a court of equity so fettered that where it is shown that the property has been converted by the vendee and the proceeds, in the form of notes or credits are *identified beyond question* in his hands, or in possession of his voluntary assignee, it cannot impound such proceeds for the benefit of the defrauded vendor? The only reason urged in denial of this power, which to our minds has any force, is based on the assumption that it would be contrary to public policy to admit such an equitable principle into commercial transactions. But with the two limitations adverted to, and which ought strictly to be observed (1) that it must appear that the plaintiff has no adequate remedy at law, either in consequence of insolvency, the dispersion of the property or other cause, and (2) *that nothing will be adjudged as proceeds except*

what can be specifically identified as such, business interests will have adequate protection. Indeed, the disturbance would be much less than is now permitted in following the property from hand to hand until a bona fide purchaser is found."

In the case at bar, complainant has a plain, speedy and adequate remedy at law in an action for damages against defendants. If the Daly Estate profited by the tort, as is alleged in this bill, then the executrix can be joined with the others in the action for damages. Under the bill none of the defendants is alleged to be insolvent, and each of them is presumed to be fully able to respond to a proper judgment. Complainant can much more readily obtain full redress through a judgment at law for whatever damages it has sustained than in this action or any form of action in equity.

In the second place, conceding that complainant could disregard its remedy at law and appellees' right to a jury trial and proceed in equity, we submit that there is absolutely nothing in the bill of complaint which would sustain an action to declare a trust in or to follow the proceeds of complainant's property into any property of any of the appellees. There is not only an absence of the absolutely essential allegations which would identify and ascertain the property into which complainant claims the proceeds of its timber have been converted, but in fact the allegations of the bill positively negative the possibility of any such identification or ascertainment.

In the bill, transcript, pages 23, 29, and 30, it is stated that it is impossible to allege who appropriated the pro-

ceeds of the sales, when they were appropriated, in what way, or what became of them. The only allegation in the bill which charges that the proceeds of the trespasses went into any property now in existence is the following allegation found on page 52 of the transcript:

"That a large portion of said asset was the result of the proceeds of his illegal acts in his lifetime in trespassing upon the lands of your orator as hereinbefore charged."

This allegation refers only to the Daly Estate.

Whenever the doctrine that a trust will be deemed created out of property purchased with funds obtained by fraud or funds that have been misappropriated or misapplied, the rule is laid down clearly that the first essential to the maintaining of the suit is that the lands sought to be impressed with the trust, must be clearly described and identified, and the money wrongfully used or misappropriated must be definitely traced and clearly proved to have been invested in the lands. Where the trust money has been mingled with other moneys so as to be indistinguishable and its identity lost, no trust in any specific property can arise.

This proposition is also clearly and repeatedly recognized in the New York cases above referred to, and cited by counsel for appellant.

See Pomeroy Eq. Juris., 2d edition, vol. 3, secs. 1048, 1051, 1058, 1080.

Ferris v. Van Vechten, 73 N. Y. 113.

In Ferris vs. Van Vechten, supra, the rule is stated as follows:

"The money paid by the trustee for lands or other property or for choses in action sought to be subjected

to the original trust must be identified as trust moneys, and this is clearly recognized in all the cases, and, in very many of them, this has been the difficult question of fact upon which they have hinged, and the principle to be deduced from them is that when the trust fund has consisted of money and been mingled with other moneys of the trustee in one mass, undivided and indistinguishable, and the trustee has made investments generally from money in his possession, the cestui que trust cannot claim a specific lien upon the property or funds constituting the investment."

In the case at bar, there is no claim made that it can be shown that any moneys derived from any of the alleged trespasses had been kept separate or could be identified or traced in any manner. In fact, the bill shows that the proceeds have been intermingled, and sent in every direction. In every case of trespass and conversion where the defendant has property at all, the same allegations might be made, and the action maintained in equity. All that would be necessary would be to allege just what is alleged in this cause, and that is that the defendant has property, has profited by the trespasses, and that therefore a portion of that property must have come from the proceeds of the trespass. Until complainant can present the Court with some facts as to who received the proceeds of its property, into what property or character of property the same was converted, and the other facts necessary to trace the complainant's funds or property into specific property

held by defendants, surely complainant cannot contend that it is in a position to have a trust declared.

But counsel for appellant may contend that in order to carry out his theory of trusts it is necessary that he have a discovery in order to get the necessary facts. In our original brief, we respectfully submit, we have clearly shown by the authorities cited, that a bill for discovery alone cannot be maintained, and where, as counsel for appellant states in his brief in this case, the case is for relief and discovery, when the facts stated are insufficient to entitle the complainant to relief, the discovery must fail also.

Venner vs. Atchison, T. & S. F. R. Co., 28 Fed. 581.

Everson vs. Equitable Life Assurance Co., 68 Fed. 258, and affirmed in 71 Fed. 570.

McLanahan vs. Davis, 8 How. (U. S.) 170.

In this connection, as upon other points urged in the case, the learned counsel for appellant contends that the bill should be sustained because it is apparent that the equitable remedy would be more efficient. Why it would be more efficient is not apparent from the bill. Surely, there would be no difficulty in proceeding to judgment in the ordinary course of an action at law. There would be no difficulty in issuing execution and collecting that judgment. The doctrine sometimes stated in equity that a party can proceed there if the remedy is shown to be more complete and efficient than at law, does not

refer to the fact that the procedure in equity generally may be clearer or more convenient, and has no reference to the convenience of parties or counsel in trying a case. It plainly means a more efficient remedy or result, and does not refer to the manner of reading that result. If a party is enabled in the ordinary course and procedure at common law to proceed and obtain and collect his judgment, he has no standing in equity, and the convenience or wishes of parties or counsel surely cannot be weighed against a constitutional right to trial by jury in all cases like the present one, where legal rights are involved.

There is no peculiar condition presented by the facts in this case. There is no reason presented for asserting that under the facts presented by this particular case, for any reason, either general or particular, a court of equity should interpose. The same condition would arise, and does arise, in every action of trespass and conversion where a series of torts is charged. It is immaterial to the defendants whether their controversy with the Government, upon the matters presented in this bill, is determined in a court of law or equity, but to sustain the complainant's contention is simply to work an upheaval of the entire system of Federal jurisprudence, and to hold that the right to a trial by jury is but a memory.

We respectfully submit the judgment of the lower court should be affirmed.

Respectfully submitted,

W. W. DIXON,

A. J. CAMPBELL,

A. J. SHORES,

C. F. KELLEY,

JOHN F. FORBIS, and

L. O. EVANS,

Of Butte, Montana,

Solicitors and of Counsel for Appellees.